

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES LARSEN

Claimant

VS.

KTC, INC.

Respondent

AND

KS TRUCKERS RISK MANAGEMENT GROUP

Insurance Carrier

Docket No. 234,170

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Jon L. Frobish on May 27, 1999, as amended on June 11, 1999. The Board heard oral argument on November 3, 1999.

APPEARANCES

David H. Farris of Wichita, Kansas, appeared on behalf of claimant. Kevin J. Kruse of Overland Park, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record consisted of the transcript of the regular hearing dated March 25, 1999; the deposition of Pedro A. Murati, M.D., dated April 16, 1999; the deposition of Peter D. Workman, D.C., dated May 25, 1999; the deposition of Ronald N. Whitmer, D.O., dated May 25, 1999; and the deposition of Terrance C. Tisdale, M.D., dated May 26, 1999. The Appeals Board has adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded benefits for a 10 percent permanent partial disability based on functional impairment. On appeal, respondent contends the disability should be lower. Claimant asks that we affirm the award. Claimant initially argued respondent's appeal was not filed within the ten days allowed under K.S.A. 1997 Supp. 44-551(b)(1), but claimant withdrew this argument at the time of oral argument.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the claimant has a 7.5 percent permanent partial disability and further finds that claimant did not have preexisting functional impairment to be subtracted pursuant to K.S.A. 44-510a.

Findings of Fact

1. Claimant injured his back, leg, ribs, and head on December 3, 1997, in a work-related motor vehicle accident. The parties stipulated to all issues except the nature and extent of disability.

2. Claimant received treatment from Dr. Peter D. Workman, a chiropractor; Dr. Ronald N. Whitmer, his family physician; and ultimately Dr. Terrance C. Tisdale, an orthopedic physician. Dr. Workman had treated claimant for low back complaints before the accident, including a visit approximately 11 days before the accident, but did not recommend restrictions. He testified claimant was not taking medication before the accident and had no indication of a bulging disc before the accident.

3. Dr. Tisdale prescribed a series of epidural injections for the low back injury. Dr. Tisdale rated claimant's impairment as 5 percent of the whole body. Dr. Tisdale reviewed records of treatment claimant had received before the accident, including records from Dr. Workman, and concluded claimant had some permanent impairment before the accident. But Dr. Tisdale agreed that the bulging disc shown by the MRI after the accident did not appear to have existed before the accident. Dr. Tisdale testified that he would attribute 25 percent of the impairment to preexisting spinal condition and 75 percent to the work-related accident. He initially testified he had "arbitrarily" assigned 25 percent of the rating to the preexisting condition and 75 percent to the accident. He later testified that this opinion was to a reasonable degree of medical certainty.

4. Dr. Pedro A. Murati examined claimant and evaluated his impairment at the request of claimant's counsel. He rated the impairment as 10 percent of the whole body. He also recommended restrictions. Specifically he recommended claimant limit activities as follows:

- occasional climb stairs, ladders, squat and crawl
- frequently drive
- lift/carry/push/pull no more than 50 pounds occasionally, 35 pounds frequently, 20 pounds constantly
- lumbar support while sitting/driving
- good body mechanics at all times
- alternate sit/stand/walk
- use an air chair

Claimant did not inform Dr. Murati of the low back symptoms he had before this injury. But when confronted with information about the prior complaints and treatment with

Dr. Workman, Dr. Murati opined that claimant had no preexisting impairment and testified that all of the 10 percent impairment would be from the work-related accident.

5. Dr. Workman, a chiropractor, treated claimant before this injury. He testified he began treating claimant in October 1996 for low back pain following an injury at home. Dr. Workman treated claimant on four occasions from October 28, 1996, through December 24, 1996, and then released claimant to return as needed. Claimant did not return for 11 months. Dr. Workman next saw claimant November 22, 1997, for complaints of frequent low back pain. He testified that to him frequent low back pain meant that, at a minimum, claimant had some discomfort during the day. The discomfort could range from discomfort which left the claimant able to function at a totally normal capacity to discomfort which meant the individual could not do anything. Even though Dr. Workman saw claimant for low back pain on these occasions before the accident in this case, he testified that according to his notes there was no indication that claimant had an impairment that affected his daily living activities. He found tightness in the low back muscles but could not say that claimant had chronic low back pain.

6. The Board concludes the evidence does not establish that claimant had a permanent functional impairment to the low back prior to the injury in this case. Although Dr. Tisdale opined that claimant did have some preexisting impairment, 25 percent of his 5 percent or 1.25 percent, he bases his opinion on the records of Dr. Workman. Dr. Workman, however, did not construe his own records in a way which would support Dr. Tisdale's opinion.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. Based on the testimony of Dr. Murati who rated the impairment at 10 percent and the testimony of Dr. Tisdale who rated the impairment as 5 percent, the Board finds claimant has a 7.5 percent permanent partial disability based on functional impairment. K.S.A. 44-510e.

3. K.S.A. 44-501 provides that the disability awarded must be reduced by the extent of any preexisting functional impairment:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

4. The Board has concluded in this case that respondent has not proven claimant had a preexisting permanent impairment and none should be deducted from the 7.5 percent found.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on May 27, 1999, as amended on June 11, 1999, should be, and is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, James Larsen, and against the respondent, KTC, Inc., and its insurance carrier, Kansas Truckers Risk Management Group, for an accidental injury which occurred December 3, 1997, for 31.13 weeks at the rate of \$351 per week or \$10,926.63 for a 7.5% permanent partial disability, all presently due and owing less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of December 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

I agree with the majority's award and the finding that a preexisting functional impairment has not been established. But I disagree with the conclusion that respondent bears the burden of proof. K.S.A. 44-501(a) clearly places the burden of proof on the claimant. I do not interpret K.S.A. 44-501(c) as shifting this burden to respondent by requiring respondent to prove the percentage of claimant's preexisting functional impairment. K.S.A. 44-501(c) provides:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased

disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

It is claimant's burden to prove all of the various conditions upon which his entitlement to compensation depends. This includes proving what the nature and extent of his disability is from the alleged work-related accident. Claimant bears the burden of proving how much of his present functional impairment is from the work-related accident.

BOARD MEMBER

c: David H. Farris, Wichita, KS
Kevin J. Kruse, Overland Park, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director